

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDWARD JOSEPH CASTLEBERRY

Claimant

VS.

SIROKY WELL SERVICE, INC.

Respondent

AND

MID-CONTINENT CASUALTY COMPANY

Insurance Carrier

Docket No. 160,014

ORDER

ON the 1st day of February, 1994, the application of the respondent and insurance carrier for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson, dated December 28, 1993, and the Nunc Pro Tunc Award dated January 4, 1994, came on before the Appeals Board for oral argument in Salina, Kansas.

APPEARANCES

Claimant appeared by his attorney, Robert A. Anderson of Ellinwood, Kansas. Respondent and insurance carrier appeared by their attorney, Jerry M. Ward of Great Bend, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as specifically set forth in the Award dated December 28, 1993 and the Nunc Pro Tunc Award dated January 4, 1994.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge dated December 28, 1993 and the Nunc Pro Tunc Award dated January 4, 1994. At oral argument the parties also stipulated that nature and extent of injury and disability was not an issue for which they sought review.

ISSUES

The Administrative Law Judge found claimant's work related accident compensable. The respondent and insurance carrier appeal that finding and contend that claimant's accident was a result of horseplay and, therefore, did not arise out of and in the course of his employment. That is the issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Award of Administrative Law Judge George R. Robertson dated December 28, 1993, as corrected by the Nunc Pro Tunc Award dated January 4, 1994, is affirmed in all respects.

Claimant was employed by respondent for approximately one month as an oil field worker. On September 21, 1989, during a lull in work activities, claimant and his immediate supervisor jumped a sludge pit. Claimant broke his right ankle in the process. Although the accident happened while claimant was on duty and being paid for his time, claimant admits jumping the pit was not part of his work duties and he was "goofing off".

This was not the first time claimant and his supervisor had jumped pits. The day before the accident at a different job site claimant's supervisor encouraged claimant to jump a pit. On both occasions, claimant followed the lead of his supervisor who jumped first.

Respondent's president testified that claimant's supervisor who participated in the jumping of the pits was the individual in charge at the well site.

The primary issue in this case is whether the claimant's accidental injury "arose out of and in the course of his employment". It is the position of the respondent and insurance carrier that the accident did not "arise out of and in the course of employment", but rather that it was "horseplay" and should not be compensable.

The phrases "arising out of" and "in the course of" the employment, as used in the Kansas Workers Compensation Act (K.S.A. 44-501), have separate and distinct meanings. The terms are conjunctive and each condition must exist before compensation is allowed. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means that the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. Any injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. See Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The respondent and insurance carrier argue that the case of Neal v. Boeing Airplane Co., 161 Kan. 322, 167 P.2d 643 (1946) is controlling. In Neal the claimant was injured while lifting rolls of paper during a lull in work. The court held that the accident did not arise out of the employment. The Appeals Board finds that the Neal case is not controlling in this instance as the facts are clearly distinguishable. Regarding the issue whether the employer had any knowledge of the horseplay or had in any way acquiesced in it, the only testimony presented was that of an assistant foreman who testified that on the day before the accident he saw two or three employees attempt to lift the paper and told them it was too heavy to lift and to leave it alone or they would get hurt.

The general rule in Kansas is that an employee may recover for an injury sustained at work which results from his own horseplay when it is shown that the horseplay has become a regular incident of the employment and is known to the employer. See Carter v. Alpha Kappa Lambda Fraternity, 197 Kan. 374, 417 P.2d 137 (1966), and Thomas v. Manufacturing Company, 104 Kan. 432, 179 P.2d 372 (1919).

Based upon the above, the Appeals Board finds that due to the knowledge, acquiescence and encouragement of the respondent through its supervisor the jumping of sludge pits had become an incident of the employment at the time of the injury, and therefore, claimant's accident arose out of his employment with the respondent.

The Appeals Board adopts the findings of fact and conclusions of law as set forth in the Award of Administrative Law Judge George R. Robertson dated December 28, 1993, and the Nunc Pro Tunc Award dated January 4, 1994, that are not contrary to the findings and conclusions specifically set forth herein.

AWARD

WHEREFORE, an award of compensation is hereby entered in favor of the claimant, Edward Joseph Castleberry, and against the respondent, Siroky Well Service, Inc., and the insurance carrier, Mid-Continent Casualty Company as set forth in the Award of Administrative Law Judge George R. Robertson dated December 28, 1993 and the Nunc Pro Tunc Award dated January 4, 1994, which award is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Robert A. Anderson, P.O. Box 398, Ellinwood, Kansas 67526-0398
Jerry M. Ward, P.O. Drawer 2005, Great Bend, Kansas 67530-2005
George R. Robertson, Administrative Law Judge
George Gomez, Director